Customs Bulletin

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

General Notices

USER FEE ADVISORY COMMITTEE MEETING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Consolidated Omnibus Budget Reconciliation Act of 1985, and the Federal Advisory Committee Act, a User Fee Advisory Committee for the Customs Service has been established. This document lists the members of the Committee, its purpose, and announces a forthcoming meeting and the agenda for the meeting.

DATE AND TIME: August 27, 1987, 1:30 p.m.

ADDRESS: Customs Service Headquarters, 1301 Constitution Avenue N.W., Room 3428, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Chuck Davies, Director, Customs User Fee Task Force, 202–566–9425.

SUPPLEMENTARY INFORMATION: The Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99–272), established a schedule of fees chargeable to users of various services provided by Customs in connection with the processing of persons, aircraft, vehicles, vessels and dutiable mail arriving in the U.S., as well as for the payment of an annual fee by Customs brokers. Subsequently, section 8101 of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509), established an ad valorem user fee to be collected by Customs on formal entries of imported merchandise. These user fees, which have been codified in 19 U.S.C. 58C, were modified by the Tax Reform Act of 1986 (Pub. L. 99–514).

Section 13033 of Pub. L. 99–272 provided that in accordance with the provisions of the Federal Advisory Committee Act (Pub. L. 92–463), the Secretary of the Treasury shall establish an advisory committee, whose membership shall consist of representatives from the airline, shipping, and other transportation industries, the general public, and others who may be subject to any fee or charge (1) authorized by law, or (2) proposed by the U.S. Customs Service for the purpose of covering expenses incurred by the Customs Service.

Further, the advisory committee shall meet on a periodic basis and shall advise the Secretary on issues related to the performance of the Customs services. This advice shall include, but not be limited to, such issues as the time periods during which such services should be performed, the proper number and deployment of inspection officers, the level of fees, and the appropriations of any proposed fee. The Secretary shall give substantial consideration to the views of the advisory committee in the exercise of his duties.

In accordance with the Federal Advisory Committee Act the Secretary has established a charter for User Fee Advisory Committee for the Customs Service and approved the following members to serve on the Committee.

Committee Members

James Landry, senior vice president and general counsel, Air Transport Association of America, 1709 New York Avenue NW, Washington, DC 20006.

Gary S. Taylor, corporate director, customer service and documentation services, American President Lines, 1800 Harrison Street, Oakland, CA 94612.

Eugene Milosh, president, American Association of Exporters and Importers, 11 West 42nd Street, New York, NY 10036.

Lana R. Batts, vice president policy, American Trucking Association, 2200 Mill Road, Alexandria, VA 22314.

J. Thomas Tidd, vice president and general counsel, Association of American Railroads, 50 F Street NW. Washington, DC 20001.

Paul Brown, director of finance, Board of Harbour Commissioners (Long Beach), P.O. Box 570, Long Beach, CA 90801.

J. Ron Brinson, executive director (past president), Board of Commissioners, Port of New Orleans, P.O. Box 60046, New Orleans, LA 70160.

Edwin Reitman, vice president, UPS, 3901 Atkinson Square, Louisville, KY 40218.

Kenneth A. Kumm, manager, customs and trade affairs, (chairman, joint industry group), 3M Corporation, 3M Center, Building 220–6E–02–Tax Division, St. Paul, MN 5144–1000.

Michael M. Miles, vice president, Rudolph Miles & Sons, Customs House Brokers, 4950 Gateway East, P.O. Box 144, El Paso, TX 79942.

William Stine, manager plans and international aviation, National Business Aircraft Association, 1200 18th Street NW, 2nd floor, Washington, DC 20036.

Arthur J. Fritz, National Customs Brokers & Forwarders Association of America, 5 World Trade Center, New York, NY 10048.

Robert J. Aaronson, director, aviation department, New York/New Jersey Port Authority, 1 World Trade Center, New York, NY 10048.

Robert P. Schaffer, senior manager, Price Waterhouse, 1801 K. Street NW, Washington, DC 20006.

Jack Yohe, airport director, Lehigh-Northamption Airport Authority, A-B-E International Airport, Allentown, PA 18101.

Richard D. Mathias, senior vice president, Pan American Airlines, 1660 L Street NW, Washington DC 20036.

Meeting Agenda

At the first meeting of the Committee held on May 19, 1987, the members were introduced to each other and a format for the conduct of future meetings was established. There also was a general discussion of the various user fees Customs is now collecting and other issues relating to the performance of Customs services for which the fees are being charged. At this meeting there will be a

discussion of the current status of user fees, collection, centralized examination stations, user fee airport/courier service reimbursement, fee levels, legislative proposals, as well as service levels. The Committee will be chaired by Michael H. Lane, Deputy Commissioner of Customs.

PUBLIC PARTICIPATION

The meeting is open to the interested public, but limited to the space available. Persons wishing to attend should notify the contact person at least two days before the meeting. The Committee chairman may permit members of the public to present oral statements at the meeting. Any member of the public may file a written statement with the Committee before, during, or after the meeting. Minutes of the meeting will be available on request.

Dated: August 11, 1987.

MICHAEL H. LANE,
Deputy Commissioner of Customs.

[Published in the Federal Register, August 13, 1987 (52 FR 30277)]

AUTOMATED SURETY INTERFACE; NOTICE OF A SIGNIFICANT NEW INFORMATION DISSEMINATION PRODUCT PURSUANT TO OMB CIRCULAR A-130

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: This document gives the public notice of a proposed new information dissemination product. The Customs Service, through its Automated Commercial System (ACS), is proposing an Automated Surety Interface. Under this program, Customs will furnish certain information to participating surety companies whose bonds cover Customs entries. This information is to be provided irrespective of any claim by Customs against the surety. For some time, disclosure of this information has been made to interested surety companies on a monthly basis. The ultimate goal of the program is a virtually simultaneous exchange of data between the surety company and Customs. As an interim step, Customs is presently conducting a pilot test under which certain data is being provided to a surety company on a weekly basis. It has been represented to Customs that payment by the sureties on claims for liquidated damages or additional duties will be expedited by eliminating the need for Customs to locate the bond and transmit a copy to the surety.

Customs recognizes that some or all of this information may be considered to be confidential business information which is protected from disclosure under exemption (b)(4) of the Freedom of Information Act (FOIA). Accordingly, Customs invites public comment

on whether the disclosure of this information will cause competitive harm.

DATES: Comments must be received on or before October 16, 1987.

ADDRESS: Comments (preferably in triplicate) may be addressed to the Chief, Regulations Control Branch, U.S. Customs Service, 1301 Constitution Ave., NW., Room 2324, Washington, D.C. 20229 (202-566-2837).

FOR FURTHER INFORMATION CONTACT: Legal aspects: John E. Elkins, Chief, Disclosure Law Branch (202) 566-8681; Operational aspects: Jim Childress, Commercial Systems Division (202) 343-0778.

SUPPLEMENTARY INFORMATION:

Background

OMB Circular A-130, dated December 12, 1985, 50 FR 52730, directs Federal agencies to inform the public of significant new proposed information dissemination products. Such notice is intended to allow agencies to gauge the impact of such products upon affected segments of the public. The proposed furnishing of entry, billing and fines, penalties, and forfeitures, information to surety companies in the proposed Automated surety Interface is such a product.

In the past, the Customs Service utilized several automated systems to process commercial transactions. However, these systems were independent with little interaction between them. It was thus necessary to be familiar with the features of each system in order to know what information was available and be able to obtain needed data. The requirement of such specialized knowledge tended to fragment scarce resources.

In March 1982, a survey of Customs automation needs was completed. Subsequently, work began on an integrated commercial system to handle a variety of data processing needs. The new system is known as the Automated Commercial System (ACS). ACS was conceived as a comprehensive Customs tracking system to include the monitoring and control of the movement of cargo, the making of entries, the assessment of penalties, and the payment of duties. ACS has been operational since February 1, 1984, and has consistently grown in application and scope.

Among the separate automated systems which had been in operation for some time is a system containing information relating to sureties and their bonds. This data has been compiled from Customs bonds as well as the accompanying entry documents and is now a module of ACS. The Automated Surety Interface is aimed at improving the accuracy of the bond information provided to Customs. It is also hoped that payment by sureties of valid Customs claims will be expedited by virtue of their having received entry and bond

information before their interest matures through a breach of the bond.

For some time, Customs has made available to sureties information in a magnetic tape format with respect to the Customs entry transactions in which the surety's bond is obligated. This information consists of the data elements which are attached as Appendix 1 to this notice. As a pilot test of the system, Customs is furnishing much of this information on a weekly basis to a surety company. The data elements to be provided weekly are set forth in Appendix 2. Three separate groups of information are to be provided. The first consists of open and liquidated entry data prior to any breach of the bond or demand for payment. The second consists of fines, penalties, and forfeitures information, and includes data relating to entries on which there has been a bond violation. The third is information with respect to bills issued to the surety.

With the exception of providing information to sureties as described above, Customs has, pursuant to the Freedom of Information Act, consistently declined to provide entry information to persons not a party to the entry transaction. The basis for this position is that entry documents contain confidential commercial information the disclosure of which could cause substantial harm to a business. Such information is exempt from disclosure pursuant to exemption (b)(4) of the FOIA (5 U.S.C. 552(b)(4)). The potential harm that disclosure of such information could present was recognized in *Timken Co.* v. *United States Custom Service*, 491 F. Supp. 557 (D.D.C. 1980). In *Timken*, the court held that value and quantity information relating to the manufacture of roller bearings was confidential commercial information and exempt from disclosure. The same retionale is applicable to other entry information such as the name of the importer, shipper, consignee, carrier, etc.

The disclosure of entry information to surety companies while refusing to provide it to others may have been based on the contractual relationship between the surety and its principal and on the fact that the surety has a contingent liability to Customs with respect to duties and liquidated damages. On the other hand, it is arguable that until a breach of the bond has occurred and the surety's liability becomes actual rather than contingent, the surety should be accorded no greater right to entry information than any other third party requester. There would appear to be no question that after a demand has been made, disclosure of information to the surety to permit it to ascertain the extent of its liability and any defenses thereto, is proper.

The disclosure of the above-discussed information to surety companies is at a pivotal stage. Before instituting the succeeding phases of the program, Customs deems it appropriate to solicit comments with respect to the impact, if any, of the disclosure of this information on brokers, importers, or other affected individuals. It is these parties rather than Customs who can best judge the impact that dis-

closure of this information will have on their business. In addition, although the proposed disclosure of information is limited to the data elements listed in Appendix 2, Customs invites comment with respect to claims for confidentiality of information provided in the entry process generally. This will enable Customs to more competently judge the releaseability of entry information in response to future requests.

In order to facilitate public response, we have enumerated below a number of issues upon which we invite comment.

1. Would the disclosure of any or all of the enumerated data elements to sureties cause competitive harm to your business? If so, identify the particular data element(s) and state the nature of the expected harm and its relationship to disclosure of the information.

2. Would the disclosure of any or all of the enumerated data elements to sureties cause competitive harm to your customers, suppliers or other parties? If so, identify the particular data element(s), state the nature of the expected harm and its relationship to disclosure of the information.

3. Would the disclosure of this information to a party other than the surety in the transaction cause competitive harm? If so, identify the particular data elements(s) and state the nature of the expected harm and its relationship to disclosure of the information.

4. As a matter of law, is a surety entitled to disclosure of any or all of the data elements described in Appendices 1 and 2 with respect to transactions in which its bond is obligated prior to any violation of the bond?

5. As a matter of practice, which of the data elements listed in the appendices are provided to the surety by you in normal course of your business?

6. What categories of entry data do you furnish to Customs which are not enumerated in the appendices that you regard as business confidential and exempt from disclosure?

COMMENTS

Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2324, U.S. Customs Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

Dated: August 10, 1987.

GERALD J. MCMANUS,
Assistant Commissioner of Customs,
Office of Commercial Operations.

APPENDIX 1

Data elements which have been available to sureties:

A Bill Data

1. Code and Name of Region, District and Port of Entry
2. Surety Code
3. Importer Number
4. Importer Name
5. Importer Address
6. Importer Address 2
7. Importer Address 3
8. Name, Number and Address of Agent
9. Customs Bill Number and Due Date
10. Age of Bill
11. Entry Assignment Date (Date the bill was entered)
12. Interest Date
13. Amount Due
14. Principal Amount
15. Interest Amount
16. Type of Bill
17. Bond Number
18. Bond Type
19. Protest Number
20. Protest Date

B Liquidated Entry Data

1. Entry Number
2. Entry Type
3. Broker Code
4. Liquidation Code
5. Importer
6. Importer Suffix
7. Entry Date
8. Liquidation Date
9. Agent IRS Number
10. Agent Suffix
11. Amount of Duty on Liquidation
12. Amount of Tax on Liquidation
13. Bill or Refund Due
14. Type of Liquidation
15. Amount of Withheld Duty
16. Mail Code (How entry-related mailings are distributed)
17. Bond Code (Type of bond)
18. Owner of Merchandise
19. Bond Number
20. Withheld Duties (Whether withheld duties were assessed)

C Unliquidated Entry Data

1. Owner Number
2. Filer Code
3. ACCFLAG (Whether entry information is complete)
4. Julian Calender Date
5. Duty Class
6. Estimated Duty Amount
7. Amount of Duty Paid
8. Tax Class

C Unliquidated Entry Data (Continued)

9. Tax Estimated Amount
10. Deferred Tax Billed
11. L-Flag (Document from which data derives)
12. Owner Number (Ultimate consignee)
13. Import Specialist Team Number
14. Ext-Susp-Code (Reason for extension or suspension of liquidation)
15. Deemed (Whether entry is deemed liquidated)
16. Final Withdrawal (Whether final withdrawal from warehouse has occurred)
17. Number of Liquidation Extensions
18. Paid Indicator (Whether estimated duties have been deposited)

Appendix 2

Data elements provided to sureties weekly culminating in an interface:

A Open Entry Data

1. Entry Number
2. Entry Type
3. Region, District, Port of Entry
4. Filer Code
5. Surety Code
6. Bond Type
7. Bond Number
8. Bond Location
9. Entry Date
10. Entry Summary Date
11. Entry Release Date
12. Reason for Late Filing
13. Late Reporting Date
14. Cancel Reason
15. Cancel Date
16. Liquidation Hold Indicator
17. Record Type
18. Extension Suspension Code
19. Extension Suspension Date
20. Number of Extensions
21. Reject Date
22. Protest Status
23. Protest Date
24. Document Filing Location
25. Importer of Record
26. Agent for Delivery on Customs Form 4811
27. Name of the Ultimate Consignee
28. Amount of Estimated Duty
29. Amount of Estimated Taxes
30. Amount of Estimated Antidumping Duties
31. Amount of Estimated Countervailing Duty
32. Payment Status
33. Amount of Duty Paid
34. Amount of Tax Paid
35. Amount of Antidumping Duties Paid
36. Delayed Antidumping Duties Code
37. Amount of Countervailing Duties Paid
38. Delayed Countervailing Duties Code

B Liquidated Entry Data

1. Entry Number
2. Surety Code
3. Number of Liq/Reliq
4. Liquidation Type
5. Liquidation Date
6. Liquidated Duty Amount
7. Liquidated Antidumping Duty Amount
8. Liquidated Countervailing Duty Amount
9. Bill or Refund Code
10. Bill or Refund Date
11. Bill or Refund Amount
12. Reason for the Bill Owed
13. Document Filing Location

C Fines, Penalties and Forfeitures Data

1. Case Number
2. Surety Code
3. Bond Number
4. Violator ID (IRS, Customs assigned or system assigned)
5. Violator Name
6. Violator Code
7. Violation Type
8. Status of Violation
9. Violation Date
10. Entry Number
11. Penalty Amount
12. Mitigated Amount
13. Collection Amount
14. Violation Citation
15. Violation Description

D Bill Data

1. Bill Number
2. Surety Code
3. Bill Type
4. Bill Date
5. Bill Status
6. Bill Age
7. Importer Number
8. Document Number
9. Protest Status
10. Protest Date
11. Protest Decision Date
12. Bill Amount
13. Principal Amount
14. Interest Amount
15. Payment Amount
16. Cancel Code

[Published in the Federal Register, August 17, 1987 (52 FR 30762)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

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Samuel M. Rosenstein

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Clerk

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Decisions of the United States Court of International Trade

(Slip Op. 87–86)

BMT COMMODITY CORP. AND DELCA DISTRIBUTORS, INC., PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND CODFISH CORP., DEFENDANT-INTERVENOR

Court No. 85–7–00915

[Judgment for defendants.]

(Decided July 22, 1987)

Freeman, Wasserman & Schneider (Jack G. Wasserman) for plaintiffs.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile,* Assistant General Counsel and *Judith M. Czako,* United States International Trade Commission, for defendants.

Patton, Boggs & Blow (Bart S. Fisher and *Michael D. Esch)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* Plaintiffs initiated this action to challenge the International Trade Commission's (Commission) final affirmative dumping determination in *Certain Dried Salted Codfish from Canada,* Inv. No. 731–TA–199, USITC Pub. No. 1711.[1] In its determination, the Commission concluded that "the establishment of an industry in the United States is materially retarded by reason of imports of dried heavy salted codfish from Canada, which the Department of Commerce (Commerce) has determined are sold at less than fair value (LTFV)." ITC Determination at 3.

The domestic industry under review consists of only one company, defendant-intervenor Codfish Corporation, which commenced operations in November 1982, in Ponce, Puerto Rico.[2] *Id.* at 5. Due to declining import prices, Codfish Corporation suffered large operating losses from 1982 through the third quarter of 1984. On July 19, 1984, it filed its antidumping petition; five months later it

[1] The results of the final determination are also published at 51 Fed. Reg. 16,904 (May 7, 1986).

[2] Although the Tariff Act of 1930 does not specifically include Puerto Rico as part of the United States for purposes of the Act, plaintiffs have not contested this issue. The court notes that the Tariff Schedules of the United States and the Antidumping Act of 1921 both contained definitions of "The United States" which encompassed Puerto Rico. The Trade Agreements Act of 1979 did not adopt the definition of "United States" included in the Antidumping Act of 1921, but there is no indication that Congress intended to exclude Puerto Rico from the purview of the Act. *See* S. Rep. No. 149, 96th Cong., 1st Sess. at 107 (no substantial rules intended to be changed except as indicated in the Report), *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 493.

ceased operating and filed a petition for reorganization under the federal bankruptcy laws. At the time the final determination was published, Codfish Corporation had taken steps to reopen its plant. It received approval for a $2 million line of credit from the Government Development Bank, and negotiated several new agreements for the procurement of fresh cod and the distribution of its processed product. *Id.* at 8–9.

In its determination, the Commission concluded that a pervasive pattern of underselling by dominant Canadian imports of codfish had resulted in the suppression and depression of domestic prices. *Id.* at 11. The Commission confirmed virtually all of defendant-intervenor's allegations of lost sales and revenues, *id.* at 12, and further found that the prices of Canadian imports, after falling continuously from 1982 through the third quarter of 1984, rose across the board after defendant-intervenor ceased production in the final quarter of 1984. *Id.* at 11.

Plaintiffs do not contest these conclusions; rather, they challenge a portion of the legal framework developed by the Commission for cases involving the material retardation of domestic industries. The parties agree that existing case law, administrative precedent, and legislative history offer little guidance in this area. Prior Commission determinations establish only that "(1) application of the material retardation standard is not limited to industries that have not yet begun production, but extends as well to new facilities that have initiated production but have not yet stabilized their operations; (2) because the attempt to establish a new industry is inherently unique, determination of whether the establishment of an industry is materially retarded is to be made on a case-by-case basis; and (3) in instances involving an industry that has not yet undertaken production, there must be a sufficient indication that the industry has made 'substantial commitment' to commerce production.[3] *Id.* at 4–5.

The Commission developed additional legal standards to complete the analytical framework necessary for its material retardation analysis. It first attempted to ascertain whether the investigation involved material injury or the threat thereof, rather than material retardation. Because defendant-intervenor was "never able to stabilize production at a level which even approached a reasonable break-even point," the Commission determined that its operations were never "established," and, therefore, that material retardation was the applicable legal standard. *Id.* at 5.

Having concluded that material retardation was at issue, the Commission then stated that the proper inquiry for determining the presence of material retardation was "whether the level of activities of Codfish Corporation reflect merely the normal start-up condi-

[3] *See, e.g., Thin Sheet Glass from Switzerland, Belgium, and the Federal Republic of Germany,* Inv. Nos. 731–TA–127, 128, and 129, USITC Pub. No. 1376 (1983) (Preliminary Dumping); *Certain Commuter Airplanes from France and Italy,* Inv. Nos. 701–TA–174 and 175, USITC Pub. No. 1296 (1982) (Preliminary Dumping); *Salmon Gill Fish Netting of Manmade Fibers from Japan,* Inv. No. 751–TA–5, USITC Pub. No. 1234 (1982) (Review of Dumping Determination under § 751(b) of the Tariff Act of 1930).

tions of a company entering an admittedly difficult market or whether the performance is worse than what could reasonably be expected and thus be deemed materially retarded." *Id.* The majority determined that Codfish Corporation's performance was, in fact, worse than what could reasonably be expected, but it did not conclude that material retardation had been established at this point. Instead, the majority stated that the viability of defendant-intervenor's business was also a relevant concern in this case. *Id.* at 7. The elements of viability that the Commission considered important in this case were "the ability to produce a marketable product, which is qualitatively acceptable to purchasers, and which can be sold at a price which is competitive with fairly traded imports." *Id.* at 8. After finding that Codfish Corporation's business was viable, the Commission concluded that material retardation had been established. *Id.* at 8–9.

Plaintiffs object to the Commission's treatment of the viability issue, claiming that the legal standard of viability formulated by the majority was not in accordance with law, and that its finding of viability was unsupported by substantial evidence. These issues are addressed below.

I. *The Legal Propriety of the Commission's Viability Standard*

Plaintiffs argue that the Commission's determination was not in accordance with law because a majority of the commissioners did not adopt "a single, identifiable standard of law" on the issue of viability. Plaintiffs' Reply Brief at 7. In the determination, one commissioner focused solely upon the viability of the domestic industry *during the period of investigation.* He explicitly stated that, in his opinion, the petitioner need not prove future viability. ITC Determination at 7 n.16. Another commissioner considered the viability of Codfish Corporation *at its inception,* but stated that future viability was also relevant "as it strengthen[ed] his conclusions concerning the viability of the domestic industry." *Id.* at 8 n.20. The two remaining commissioners who concurred in the majority opinion focused upon the viability of Codfish Corporation at its inception and in the future. *Id.* at 7–8.

In order for the Commission's determination to be upheld in this case, the court must be able to discern from the determination that a majority of the Commission has based its conclusions upon legally sufficient reasoning. *See* 19 U.S.C. § 1677(1)(c) (1982). *Cf. USX Corp.* v. *United States,* 11 CIT——, 655 F. Supp. 487, 497 (1987) (action remanded where majority of commissioners failed to cumulate imports for reasons contrary to law). The court will first consider the soundness of the Commission's legal approach and will then discuss the extent to which the legal underpinnings were accepted by the individual commissioners.

None of the parties to this proceeding have challenged the Commission's conclusion that Codfish Corporation's viability at incep-

tion is a relevant consideration in this case.[4] As plaintiffs have stated, it would be counterproductive for the unfair trade laws to provide relief to domestic industries that cannot compete. *See* R. Caves and R. Jones, *World Trade and Payments* 260 (1973) ("protection is not worthwhile if the [domestic] industry could never compete"); *accord*, J. Viner, *Dumping: A Problem in International Trade* 137 (1966). The imposition of duties upon foreign imports would only increase costs to American consumer, without providing a reciprocal benefit to nascent American industries. In its determination, the Commission considered Codfish Corporation's labor, energy and raw materials costs; the cost-effectiveness of its distribution and marketing channels; and the effect of the hot, humid Puerto Rican climate on the cost of drying the codfish. ITC Determination at 7–8. These variables can all affect the viability of a nascent enterprise, and therefore were proper objects of scrutiny for the Commission.[5]

Although it agrees with the analysis of "viability at inception" performed by the Commission, the court has some reservations about the Commission's analysis of "future viability." Observing that Codfish Corporation had ceased operations and filed for bankruptcy in November 1984, the Commission stated that "[t]he future viability of petitioner's business operations is a relevant issue in determining whether the establishment of a domestic industry is being materially retarded." ITC Determination at 8. It then discussed Codfish Corporation's new plans for recapitalization, product distribution, and alternative sources of cod supply. *Id.* at 8–9. On the basis of this information, the Commission performed a "break-even analysis" of Codfish Corporation's operations to determine whether it "could be able to recommence operations, given fairly traded competition from imports, and stabilize its production and sales at a level which will allow it to become established." *Id.* at 9.[6]

The import of the Commission's analysis is that it could have *denied* relief based upon the conditions under which Codfish Corporation was to be reorganized. In other words, even if it had found Codfish Corporation's pre-reorganization problems were attributable to

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[4] The majority determination does not explicitly state that the Commission was considering the viability of Codfish Corporation from the time of its inception; however, this fact may be inferred from the Commission's statement that it analyzed the company's *initial* business plan and *original* marketing and feasibility study. ITC Determination at 8.

[5] Codfish Corporation seizes upon language in the determination to argue that the Commission was solely concerned with *inherent* viability. *See* ITC Determination at 7. It contends that the inherent viability standard requires the Commission to conclude that an industry is not viable only if "*inherent* disadvantages *entirely unrelated to the effects of LTFV imports* * * * remove *any* commercial possibility that the industry could become established." Brief of Defendant-Intervenor at 13. In effect, Codfish Corporation requests that the Commission "defer to the business judgment of investors, so long as their plan of operations is within the realm of commercial reasonableness." *Id.* at 12.

In the determination and in its brief, the Commission appears to have used the terms "inherent viability" and "viability at inception" interchangeably. Its finding of viability was based upon evidence that "the initial business plan of [Codfish Corporation] appear[ed] reasonably calculated and could have succeeded." ITC Determination at 8. This analysis of viability does not appear to be as deferential to the judgment of investors as the interpretation offered by Codfish Corporation. Some of the factors considered by the Commission, such as marketing channels and energy costs are not truly *inherent* in the nature of an enterprise since they may change over the short term. Furthermore, nothing in the Commission's determination implies that the judgment of investors, no matter how misguided, should be accorded substantial deference. Without attempting to define the parameters of the viability standard further, a task the Commission will no doubt undertake in future cases, the court simply concludes that the Commission acted reasonably in the selection of factors to be considered in making the viability determination here.

[6] The Commission's use of the term "future viability" is somewhat confusing. A determination that an industry is "viable" necessarily means that it is capable of surviving into the future. To the extent that "future viability" is used in this redundant fashion, the court has no objection to it. In this investigation, however, the term "future viability" refers to the viability of Codfish Corporation only in its restructured condition. The court's objection to the Commission's "future viability" analysis specifically refers to the use of the term in this fashion.

LTFV imports, the Commission could have made a negative determination simply because the imposition of duties would not have been an effective solution to the injured industry's problems.

Such a test would run afoul of 19 U.S.C. § 1673d(b)(1)(B), by allowing the Commission to make a negative determination when material retardation is being caused by LTFV imports. In its determination, the Commission considered the reorganized industry's new characteristics to evaluate future viability. The Commission, however, failed to consider how the existence of LTFV imports in the marketplace affected the terms upon which the reorganized Codfish Corporation procured fresh financing and signed new contracts. Where the Commission judges "future viability" based upon factors affected by LTFV imports, without adequately considering such effects, its analysis is inherently flawed. If no allowance is made for the continuing effects of LTFV imports, foreign enterprises that force nascent domestic firms into bankruptcy, in certain circumstances, could preclude indefinitely the establishment of such industries. Such a result cannot reasonably be intended by the statute.[7]

The Commission's analysis of "future viability," however, does not compel remand. The Commission did not make a *negative* determination based upon "future viability." The Commission's decision was affirmative, and its analysis is sufficient to support the affirmative determination. All four commissioners concurring in the majority opinion agreed on the analysis of the relevant issue here: Codfish Corporation's viability apart from the effects of LTFV imports (which in this case is essentially "viability at inception").[8] The only difference of opinion among this group concerned the propriety of "future viability" as a relevant factor in the case.[9] For this reason, the court concludes that the determination was reached in a manner in accordance with law.

Substantial Evidence

Plaintiffs also contend that the Commission's final determination is not supported by substantial evidence in the record. "Substantial evidence" refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Electric Indus. Co* v. *United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951)). Again, plaintiffs do not challenge the portion of the determination regarding causation, but attack only that portion of the determina-

[7] Plaintiffs argue that the Commission's finding of "future viability" is equivalent to a determination that there is a "threat of future injury" to a nascent industry. Plaintiffs' Brief at 12. Plaintiffs contend that this test defies Congressional intent, because Congress specifically chose to incorporate a "threat" analysis only with respect to material injury of an *established* industry. *See* 19 U.S.C. § 1673d(b)(1)(A) (1982 & Supp. III 1985). The court does not find this argument persuasive. The Commission did not find that there was a threat of "future retardation," as plaintiff contends. Rather, the Commission concluded that the reorganized corporation could become established. ITC Determination at 9. In effect, the Commission performed a present material retardation analysis with respect to both the original and restructured entities.

[8] The court does not preclude the possibility that in another case it can be demonstrated that an industry once considered viable is no longer viable because of changing conditions, apart from the effects of LTFV imports. *See supra,* note 6. This is not the case at hand. Plaintiffs have made no showing that there were such unaffected factors.

[9] One of the four commissioners in the majority stated that he had considered "viability during the period of the investigation," rather than viability at inception. ITC Determination at 7 n.16. This commissioner, however, appears to have considered the same factors as the other members of the majority. Even if his reasoning were construed to conflict with the other members, the determination would still be supported by a majority of three commissioners.

tion relating to the viability of Codfish Corporation. Specifically, plaintiffs contend that the Commission relied upon "error-ridden" documents; accepted the company's unrealistic assertions regarding its fixed costs, future sources of cod, and future costs of transportation; and improperly failed to consider the declining market for cod in its break-even analysis. Plaintiffs' Brief at 24–34. In addition, plaintiffs contend that Codfish Corporation was not viable at its inception because it was located in a hot, humid region where drying costs are high, and because it lacked adequate capital, marketing ability, and an economical source of cod. Plaintiffs' Brief at 18–22.

Plaintiffs' do not contend that the initial feasibility study considered by the Commission was flawed because of defects in the raw data contained in the report. Rather, plaintiffs challenge the conclusions reached in the document, and express a preference for the findings made in a separate study prepared by the Citicorp Capital Markets Group. Plaintiffs allege that the majority erred by not considering this report and adopting some of its conclusions. In essence, plaintiffs are questioning the thoroughness of the Commission's investigation. *See Kenda Rubber Indus. Co.* v. *United States,* 10 CIT——, 630 F. Supp. 354, 356 n.4 (1986) (contrasting determinations not supported by substantial evidence to those in which the underlying investigation was not legally sufficient).

In response, the government has challenged the relevancy of the Citicorp report, stating that "a study prepared with the benefit of two years experience, and the hindsight which accompanies experience, is hardly a reasonable basis upon which to conclude that Codfish Corporation was not viable at its inception." Defendants' Brief at 20. Plaintiffs dismiss this argument as "crypto-legalese mumbo-jumbo" and maintain that the timing of the report should not affect its probative value on the issue of viability. Plaintiffs' Reply at 13.

Plaintiffs' characterization of defendants' argument is a bit overstated, but not far off the mark. A report analyzing the progress of an industry over time may contain important insights into how a specific factors affect profitability, provided that these factors are considered in light of the possible effect of LTFV imports. Nevertheless, it is apparent that the Citicorp study *was* considered by the Commission during the preparation of its own break-even analysis. *See* ITC Determination at A–24. Thus, the ITC cannot be said to have conducted an insufficient investigation as a matter of law; the real question at issue is whether, in light of the Citicorp report, the Commission's findings are supported by substantial evidence.

After reviewing the remaining allegations and related material in the record, the court finds that the Commission's determination was supported by substantial evidence. Although plaintiffs assert that Codfish Corporation's working capital was inadequate, they presented no evidence to the Commission regarding the level of working capital necessary for the proper functioning of Codfish Corporation's facility. Plaintiffs offered some evidence on the amount

of working capital their own facility requires, but this data was not shown to be applicable to Codfish Corporation. Hearing Transcript at 112. Furthermore, defendant-intervenor presented uncontroverted evidence that Codfish Corporation never lacked working capital with which to purchase inventory. *See* Prehearing Brief of Codfish Corp. at 36.

From the record, it is also clear that the Commission was aware of Codfish Corporation's practice of marketing strictly to wholesale purchasers. ITC Staff Report at A–13. Although plaintiffs argue that this strategy destroyed the company's viability, there is no evidence in the record demonstrating that this was an unreasonable practice, or that it was an inherent feature of the company's business strategy. Plaintiffs cite a passage from the Citicorp study which concluded that the company "did not establish a coherent marketing strategy," but the study did not conclude that direct access to retailers was essential for viability. It stated that "[a] link to an existing strong wholesaler with a good sales force is the logical route for the company to follow * * *." *Citicorp Study,* Doc. 2, at 49.

The Commission also rejected plaintiffs' assertion that consumer demand for cod was declining. It specifically noted that the sales volume of codfish was stable at relatively high price levels in 1985, a fact suggesting that demand was not declining for the product. ITC Determination at 12. Plaintiffs' remaining contentions, that sources of codfish were too expensive, and that the Puerto Rican climate is unacceptable for a fish drying operation, were found by the majority not to outweigh advantages that Codfish Corporation gained by locating near a large codfish market with low labor costs. ITC Determination at 7. It is not the function of this court to "reweigh" factors considered by the Commission; it may only consider whether the Commission's determinations are supported by substantial evidence. *Matsushita Electric,* 750 F.2d at 936. The Commission has clearly satisfied this test.

As indicated, the court has concluded that the Commission's finding regarding initial viability was supported by substantial evidence. The court need not consider whether substantial evidence supported the Commission's determination with respect to the industry's post-bankruptcy cod sources, transportation costs, and recapitalization because the record contains no evidence to support a decision to set aside the finding of initial viability due to changed circumstances independent of LTFV imports.[10]

For the foregoing reasons, the Commission's decision is sustained.

[10] As discussed above, the court does not find it necessary to review the Commission's discussion of "future viability." The court notes, however, that if it had reviewed this aspect of the determination, it would have rejected plaintiffs' arguments. The Commission's "future viability" analysis considered the same factors discussed in its analysis of "viability at inception," and was supported by substantial evidence contained in the Citicorp study and in the Commission's own break-even analysis.

(Slip Op. 87-87)

MANUFACTURAS INDUSTRIALES DE NOGALES, S.A., KAREN INTERNACIONAL, S.A. DE C.V. AND ELEGANCE DE BAJA CALIFORNIA, S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 85-03-00373

MEMORANDUM

[Plaintiffs' motion for judgment on agency record denied; action dismissed.]

(Decided July 24, 1987)

Brownstein Zeidman and Schomer (Irwin P. Altshuler, David R. Amerine and *Denise T. DiPersio)* for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* and Office of the Assistant General Counsel for Import Administration, U.S. Department of Commerce *(Eileen P. Shannon)* for the defendant.

AQUILINO, *Judge:* After a third administrative review of a countervailing-duty order on leather wearing apparel from Mexico, the International Trade Administration, U.S. Department of Commerce ("ITA") determined (1) to instruct the Customs Service not to assess countervailing duties on merchandise shipped by the plaintiffs or to require collection of cash deposits of estimated such duties from them but also (2) not to revoke the order as to them.

The plaintiffs have moved pursuant to CIT Rule 56.1 for judgment on the agency record, setting aside the decision not to revoke on grounds that they have not applied for or received any countervailable benefits during the period covered by the administrative reviews, or at any other time, and that the decision is unsupported by substantial evidence on the record and is not in accordance with law.

I

The plaintiffs had requested revocation as to them pursuant to 19 C.F.R. § 355.42, which provides, in part:

> (a) *In general.* Whenever the Secretary determines that a subsidy within the meaning of [19 U.S.C. § 1677(5)] is no longer being bestowed upon the manufacture, production or exportation of merchandise which is the subject of a Countervailing Duty Order and is satisfied that there is no likelihood of resumption of the subsidy, he may act to revoke or terminate, in whole or in part, such order or suspended investigation. Ordinarily, consideration of such revocation or termination will be made only subsequent to a review as described in § 355.41.
>
> (b) *Application to revoke or terminate.* An application for the revocation of any Order * * *, premised upon the lack of a legal basis for the imposition of countervailing duties, may be submitted in writing by an interested party to the Secretary together with detailed information demonstrating that the imported merchandise no longer benefits from a net subsidy. Ordi-

> narily, such an application will be considered only if the production, manufacture, or exportation of the merchandise has been without benefit of a net subsidy for at least a two-year period following the dat of publication in the FEDERAL REGISTER of a Countervailing Duty Order or notice of suspension of investigation; *provided, however,* that where a firm can demonstrate that neither the production nor exportation of the merchandise had benefitted from a net subsidy during the period of or immediately prior to the investigation (but the firm did not file a timely application for exclusion under § 355.38), the two-year period shall begin on the date of the preliminary determination regardless of whether that determination was affirmative or negative * * *.

This regulation emanates from 19 U.S.C. § 1675(c), which states that the ITA

> may revoke, in whole or in part, a countervailing duty order or an antidumping duty order * * * after review under this section * * *. Any such revocation * * * shall apply with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on and after a date determined by the administering authority.

Self-evidently, this provision permits the ITA to revoke an order once it has completed a review in accordance with subsection (a) of section 1675. *See, e.g., Matsushita Electric Industries Co.* v. *United States,* —— F.2d —— (Fed.Cir. July 2, 1987).

Plaintiffs' position is that, although the ITA has some discretion whether or not to revoke the outstanding countervailing-duty order, this authority is limited by facts and circumstances of the kind herein. They argue that, since the ITA has determined that they "*never* received countervailing subsidies and therefore could not possibly 'resume' receipt of such subsidies"[1], there could be "no likelihood of resumption" as specified in the regulation, and, consequently, denial of revocation was an abuse of its limited authority. *See* Plaintiffs' Brief, pp. 24–26.

Although accurate in asserting that something non-existent cannot be "resumed", plaintiffs' conclusion that therefore "the ITA's discretionary authority would appear to be inapplicable to the instant case"[2] does not necessarily follow. First, the ITA has no obligation under the statute or its regulation, *supra,* to make a determination as to whether firms like the plaintiffs have applied for or received benefits at times other than during an administrative-review period, and the defendant disputes their contention that the ITA did, in fact, determine that the countervailable benefits had never been bestowed upon the plaintiffs.[3] Moreover, "resumption", as used in the regulation, can be construed to apply to the subsidization of the merchandise in question rather than individual manu-

[1] Plaintiffs' Brief, p. 14 (emphasis in original).
[2] *Id.* at 28.
[3] *See* Defendant's Surreply to the Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Judgment on the Agency Record, p. 2.

facturers thereof.[4] Second, even assuming the plaintiffs had, as they claim, satisfied all of the requirements for revocation contained in section 355.42, the ITA was not required to grant their request. Both the regulation and the statute simply state that an order *may* be revoked. Finally, contrary to plaintiffs' restrictive reading of the regulation, the court concludes that the ITA's authority to determine the lack of likelihood of future subsidization, and ultimately whether to grant revocation, though not unbounded, is not circumscribed by lack of evidence of prior enjoyment of benefits. Although history of subsidization can enter into its likelihood-of-resumption analysis, the ITA's discretion is not divested by one found favorable to an applicant for revocation. Here, for example, the plaintiffs received no benefits during the period encompassing the investigation and administrative reviews, January 14, 1981 through June 30, 1983, but absence of subsidies for such a period does not guarantee revocation. Paragraph (b) of the regulation merely provides that an application for revocation ordinarily will be considered only upon a showing of lack of benefit of a subsidy for at least two years following publication of an order.

In sum, the court concludes that the determination of the ITA under review herein was in accordance with law within the meaning of 19 U.S.C. § 1516(b)(1)(B).

II

Section 1516a(b)(1)(B) also states that the court shall hold unlawful the determination if unsupported by substantial evidence on the record.

The ITA's preliminary determination pointed out:

> There are at least nine programs [in Mexico] which we have found countervailable and which continue to be applicable to leather wearing apparel, namely the eight programs covered in this review as well as the Article 94 loans program found countervailable in the final determination on cement from Mexico (48 FR 43063, September 21, 1983). CEDI has been suspended, but not eliminated, and the other eight programs remain in effect. As long as these programs are still in existence and usable by manufacturers and exporters of leather wearing apparel, we cannot be satisfied that there is "no likelihood of resumption of the subsidy," and therefore, preliminarily determine that the order should not be revoked with respect to these three firms. 49 Fed.Reg. 39,183 (Oct. 4, 1984).

This position was essentially reiterated in the final determination[5], and the defendant now argues that

[4] As so construed, the ITA should not entertain an application for revocation where there is *any* subsidization of the merchandise covered by an order. The plaintiffs refute such an interpretation, claiming that paragraph (b), as well as the reference to revocation "in whole or in part" in paragraph (a) and in the statute, clearly allow for revocation of an order on a firm-by-firm basis. Since the defendant does not dispute the plaintiffs on this point [*see* Defendant's Memorandum, p. 13, n. 2], and since resolution of this issue would not affect the outcome of this action, the court does not address it further.

[5] *See* 50 Fed.Reg. 6,024 (Feb. 13, 1985).

> [i]n circumstances in which a number of programs bestow countervailable bounties or grants upon manufacturers or exporters and there is no showing that plaintiffs are ineligible to receive benefits under these programs and could not avail themselves of the benefits bestowed by any of these programs in the future, the ITA's decision is clearly supported by substantial evidence in the administrative record and constitutes a reasonable exercise of statutory and regulatory discretion granted in connection with the revocation of outstanding countervailing duty orders. Defendant's Memorandum, pp. 12–13 (footnote omitted).

The plaintiffs characterize this as "*post hoc* rationalization"[6] for an incorrect determination since the ITA did not indicate during its three administrative reviews that their assurances, certifying that they have "never applied for or received benefits * * * and * * * will not apply for or receive such benefits in the future"[7] under the various programs, were inadequate. Plaintiffs' Reply, pp. 9 and 13. Further:

> Even if Defendant's new position was properly before the Court, however, Plaintiffs submit that the demonstration of continuous *de facto* non-use exceeds the requirement of *de jure* ineligibility * * *. The ITA's regulations merely require require that a firm seeking revocation * * * show that it has received no countervailable benefits for at least a two-year period * * *. *Id.* at 9–10.

The plaintiffs assert that their assurances, as well as certifications from the Mexican government to the same effect[8], satisfy this requirement, thereby justifying revocation. *See id.* While those assurances were considered adequate to avoid any countervailing duty on plaintiffs' entries and to set a zero cash-deposit rate for future entries, they do not engender automatic revocation of an outstanding order.[9]

The plaintiffs seem to ignore the fact that "[t]his investigation was conducted at all because these attorneys requested on behalf of their clients that it should be." ***Matsushita Electric Industrial Co.*** v. ***United States,*** 750 F.2d. 927, 937 (Fed. Cir. 1984) (additional views of Nichols, J.). Accordingly, it was for them to "come forward with * * * real evidence" to persuade the ITA to revoke the order. *See id.* Although the plaintiffs contend that their assurances met this burden, the agency was not obligated to rely on them[10], nor was it required to look for evidence, demonstrating the likelihood that they intended to receive subsidies in the future, in order to controvert those statements. *See id.* at 933. As the court explained in ***Matsushita,*** a case analogous to this action in that it involved a determination by the International Trade Commission ("ITC") not to re-

[6] Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Judgment on the Agency Record [hereinafter cited as "Plaintiffs' Reply"], p. 2.
[7] Record Documents ("R.Doc.") 53, 65 and 66.
[8] *See* R.Doc. 49.
[9] *Compare* R.Docs. 4 *and* 6 (regarding certification process for zero deposit rate applications) *with* 19 C.F.R. § 355.42.
[10] *See, e.g., American Permac, Inc.* v. *United States,* 10 CIT ——, 656 F.Supp. 1228, 1233 (1986).

voke an antidumping-duty order, in "no case will the Commission ever be able to rely on concrete evidence establishing that, in the future, certain events *will* occur upon revocation"[11], and "circumstantial evidence from which to infer likely intent * * * [is] always relevant and, indeed, may be more reliable than self-serving declarations." *Id.* at 934. There, as here, the agency determined that the order could not be revoked with certainty that there was no likelihood of future unfair trading.

The evidence in the record on which the ITA based this determination reveals that, for the period under review, the plaintiffs were eligible for benefits under at least the following seven of eight countervailable programs investigated: (1) Fund for the Promotion of Exports of Mexican Manufactured Products ("FOMEX"); (2) the Guarantee and Development Fund for Medium and Small Industries ("FOGAIN"); (3) Certificates of Fiscal Promotion ("CEPROFI"); (4) National Industrial Development Plan ("NIDP") preferential discounts; (5) Industrial Equipment Fund ("FONEI"); (6) State Tax Incentives; and (7) Import Duty Reductions and Exemptions.[12]

In examining the issue of whether this evidence is sufficient to support the ITA's determination to deny plaintiffs' revocation request, the court recognizes that the agency has broad discretion in the enforcement of the trade laws and that the ITA's "decision does not depend on the 'weight' of the evidence, but rather on [its] expert judgment * * * based on the evidence of record." *Matsushita Electric Industrial Co.* v. *United States,* 750 F.2d at 933. Moreover, its expertise is entitled to "tremendous deference"[13] by a reviewing court, which "must accord substantial weight to an agency's interpretation of a statute it administers". *Zenith Radio Corporation* v. *United States,* 437 U.S. 443, 450–51 (1978).

Viewing the record in this light, the court cannot conclude that the ITA's determination not to revoke is unsupported by substantial evidence within the meaning of 19 U.S.C. § 1516a(b)(1)(B). To conclude otherwise would, at a minimum, require a more compelling showing by the plaintiffs of no likelihood of future subsidization.[14] As acknowledged by Judge Nichols in his additional views[15] in *Matsushita,* those urging a result contrary to an agency determination have untaken "a heavy load indeed". 750 F.2d at 937.

The plaintiffs, in relying solely on their non-receipt of benefits and their assurances that such abstinence would continue[16], have not carried that load herein. While these points of reliance are of some moment and this court does not automatically equate eligibili-

[11] *Matsushita Electric Industrial Co.* v. *United States,* 750 F.2d 927, 933 (emphasis in original).

[12] In their briefs, the parties dispute the "reinstatement" of the Certificado de Devolucion de Impuestos ("CEDI") program, another benefit which had been available to the plaintiffs. Resolution of this disagreement by the court is unnecessary as it does not affect the outcome herein.

[13] *Smith-Corona Group, Consumer Products Division, SCM Corp.* v. *United States,* 713 F.2d 1568, 1582 (Fed.Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

[14] Were the plaintiffs the only firms eligible for countervailable benefits, and were those benefits fewer in number, reason might have dictated revocation. *See, e.g., Glass Beads from Canada,* 46 Fed.Reg. 16,099 (March 11, 1981) (ITA revoked order where only one firm was subject to it and only two programs were found countervailable).

[15] The court's opinion indicates that these views "have not been incorporated [therein] only because they read so well as separately stated." 750 F.2d at 936, n. 14.

[16] *See, e.g.,* R.Doc. 82.

ty for benefits with likelihood of receipt, it nevertheless is unable to conclude that the ITA acted unreasonably in denying revocation. Similar to the circumstances in *Matsushita*, where the Federal Circuit affirmed the ITC's determination not to revoke notwithstanding the lack of evidence establishing that the dumping would occur after revocation, plaintiffs' "failure to come forward with any real evidence" to the contrary justifies the ITA's "refusal to lift the order". 750 F.2d at 937.

Plaintiffs' contention that the regulation governing exclusion from an order, 19 C.F.R. § 355.38, somehow mandates revocation under 19 C.F.R. § 355.42(a) does not further their position. Even assuming that the plaintiffs would have been excluded from the instant order upon timely application, the court cannot conclude that the ITA therefore acted unlawfully in denying their request for revocation. The language granting the ITA discretion to revoke when it "is satisfied that there is no likelihood of resumption" of a subsidy distinguishes this regulation from the former, which is only applicable prior to imposition of an order.[17] Once the order is lawfully in effect, it need not be revoked if there is an inadequate showing that an applicant will not benefit in the future from that which has been found countervailable.

Conclusion

In view of the foregoing, the court is unable to grant plaintiffs' motion for judgment on the agency record. Rather, judgment must enter, denying the motion and dismissing this action. While the fairness of this necessary result might be debated, given plaintiffs' position, it is hardly untenable: they have not been assessed any countervailing duty nor required to post any cash deposit.

(Slip Op. 87–88)

Pistachio Group of the Association of Food Industries, Inc., et al., plaintiffs *v.* United States, defendant, California Pistachio Commission, et al., defendant-intervenors

Court No. 86–04–00475

Before DiCarlo, *Judge.*

[The action is dismissed.]

[17] The court draws the same distinction as it applies to plaintiffs' similar claim regarding the statutory and regulatory provisions governing suspension of an investigation under 19 U.S.C. § 1671c(b), as implemented by 19 C.F.R. § 355.31.

(Decided July 29, 1987)

Harris & Berg (Herbert E. Harris II and *Cheryl Ellsworth)* for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Department of Justice, Commercial Litigation Branch *(Platte B. Moring, III)* for defendant.

Fried, Frank, Harris, Shriver & Jacobson (David E. Birenbaum) for defendant-intervenors.

DiCarlo, *Judge:* Plaintiffs brought this action under 19 U.S.C. § 1516a (a)(2)(A) (Supp. III 1985), by filing a summons within 30 days after the publication of a final affirmative countervailing duty and order. Plaintiffs filed their complaint 32 days after the filing of the summons, 2 days beyond the period set forth in section 1516a. In *Pistachio Group of Food Industries, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–72 (July 17, 1986) the Court denied defendant's motion to dismiss the action for lack of jurisdiction and granted plaintiffs' motion to file its complaint out of time, relying on the language of 28 U.S.C. § 2636(c) (Supp. III 1985), Rule 3(a) of the Rules of this Court, and the precedent established in *Jernberg Forgings Co.* v. *United States,* 7 CIT 62 (1984), *vacated on other grounds,* 8 CIT 245 (1984).

Two months after the issuance of Slip Op. 86–72, our appellate court in *Georgetown Steel Corp.* v. *United States,* 801 F.2d 1308 (Fed. Cir. 1986), ruled that this Court does not have jurisdiction over actions brought under section 1516a where the complaint is not filed within 30 days after the filing of a timely summons. Without addressing the Court's earlier opinion in this case, the appellate court overruled *Jernberg Forgings* and struck down Rule 3(a), which permitted an action under 19 U.S.C. 1516a(a)(2) to be "commenced by filing a summons only."

Although plaintiffs' advance several arguments why *Georgetown Steel* should only apply prospectively, the Court holds that this action cannot proceed in light of our appellate court's jurisdictional holding.

Nor can this case proceed by invoking the residual jurisdiction of the Court under 28 U.S.C. § 1581(i). It has been consistently held that absent certain exceptional circumstances, a party may not bring an action under section 1581(i) which could properly have been brought under another jurisdictional provision. *Uniroyal, Inc.* v. *United States,* 687 F.2d 467 (CCPA 1982); *Ferrostaal Metals Corp.* v. *United States,* 11 CIT ——, Slip Op. 87–76 (June 26, 1987); *Star Sales & Distributing Corp.* v. *United States,* 10 CIT ——, Slip Op. 86–117 (Nov. 7, 1986); *Pistachio Group of the Association of Food Industries, Inc.* v. *United States,* 10 CIT ——, 638 F. Supp. 1340 (1986).

The Court determines that it lacks jurisdiction in the instant action under the rule announced in *Georgetown Steel.* The opinion in Slip Op. 86–72 is vacated. Any arguments why this action should be heard should be brought before our appellate court.

The action is dismissed. So ordered.

(Slip Op. 87-89)

CHILEAN NITRATE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND OLIN CORP., DEFENDANT-INTERVENOR

Court No. 87-07-00764

[Plaintiff's motion for preliminary injunction denied in part.]

(Decided July 29, 1987)

Busby, Rehm and Leonard (John B. Rehm and *Munford Page Hall, II)* for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Elizabeth C. Seastrum,* Civil Division, United States Department of Justice, for defendant.

Beveridge & Diamond (Alexander Sierck) for defendant-intervenor.

MEMORANDUM OPINION AND ORDER

RESTANI, *Judge:* Plaintiff in this action challenges a final annual review determination applicable to imports of sodium nitrate for industrial use from Chile.

Pursuant to a request for a temporary restraining order the court entered an order enjoining liquidation of entries covered by the annual review at issue, pending resolution of the motion for preliminary injunction. The parties do not appear to dispute the injunction against liquidation inasmuch as liquidation is normally enjoined upon request in order to preserve the court's jurisdiction over entries permanently affected by annual review determinations. *See Zenith Radio Corp.* v. *United States,* 710 F.2d 806 (Fed. Cir. 1983). This aspect of the order shall be enlarged to continue until final resolution of the action.

In addition, plaintiff sought and obtained a temporary order restraining defendant from collecting cash deposits on future imports at the rate established by the annual review. Upon consideration of oral testimony, argument and further briefing the court has determined that this aspect of the temporary order should be dissolved. Plaintiff's motion for preliminary injunction is denied to this extent, and deposits shall be collected in the ordinary manner as directed by the court following hearing on July 21, 1987.

DISCUSSION

The parties are agreed that four factors must be considered upon a motion for preliminary injunction. Although the exact treatment of the four factors has not been agreed to, the court deems it appropriate to weigh the factors together in a sliding scale manner. *See American Air Parcel Forwarding Co.* v. *United States,* 1 CIT 293, 299, 515 F. Supp. 47, 53 (1981). The first factor the court will address is plaintiff's likelihood of success on the merits.

Plaintiff claims that defendant failed to follow its own regulation when it rejected plaintiff's offer on the first day of verification to

submit missing United States sales data. The regulation reads in relevant part:

> **§ 353.51 Verification of information; use of best information available.**
>
> (b) Whenever information cannot be satisfactorily verified, or is not submitted in a timely fashion or in the form required, the submitter of the information will be notified and the affected determination will be made on the basis of the best information then otherwise available which may include the information submitted in support of the petition. An opportunity to correct inadequate submissions will be provided if the corrected submission is received in time to permit proper analysis and verification of the information concerned; otherwise no corrected submission will be taken into account. Where a party to the proceeding refuses to provide requested information, that fact may be taken into account in determining what is the best available information.

19 C.F.R. § 353.51(b) (1986).

Defendant argues that its regulation requires that plaintiff submit the missing information *prior* to verification. This is not the plain language of the regulation. There are important policy considerations behind the regulation which have been examined previously in the context of application of the best information available rule,[1] but the plain words of the regulation present a substantial question. On the other hand, the parties have indicated that there is very little information in the record which would explain plaintiff's failure to submit the vital information prior to verification. Thus, if defendant complied with the regulation, it would be difficult to say that it acted arbitrarily and abused its discretion. This is not a case where a decision in plaintiff's favor on the merits can be predicted. Thus, the court cannot ease plaintiff's burden in meeting the other strict standards for a preliminary injunction.

Second, the public interest is not a determining factor here. The public interest at stake on both sides is the fair and efficient operation of the antidumping laws, and this factor is in lock step with the merits.[2]

Third, as to the balance of hardships, plaintiff's case is formidable. It offers a bond to secure defendant, so defendant risks little. Defendant-intervenor may be harmed if the injunction is wrongly granted. There is the potential that its competitor, the plaintiff, might be forced to raise prices to offset margins if cash deposits are required. If only a bond is required, the evidence presented leads to

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[1] *See Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1559–62 (Fed. Cir. 1984).

[2] The court rejects defendant's argument that the requirement of cash deposits cannot be enjoined, or that it would not be in the public interest to enjoin the cash deposit requirement, because of the legislative history indicating the need for cash deposits. If the cash deposit requirement is enjoined it would be because collection of the deposit in these circumstances otherwise would likely violate the law. The purpose of injunctive relief is to prevent harm in such circumstances.

the conclusion that no price increase would be attempted. The effects on defendant-intervenor are, however, indirect at best. Plaintiff's hardship, in contrast, is direct and substantial, as will be discussed in connection with consideration of the most vital factor, likelihood of irreparable harm. In connection with this factor, the court notes that plaintiff may recover its immediate expenditure with interest if it is finally determined that plaintiff does not owe the duties. Thus, plaintiff is not irreparably harmed in the sense that it may recover the discrete sum of money required to be deposited. *See Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958) (the opportunity to recover previously advanced funds weighs against a finding of irreparable harm).

The real question is whether plaintiff will suffer significant and permanent monetary injury as a consequence of posting large cash deposits. The facts established relevant to this issue are as follows: Previous annual reviews utilizing plaintiff's data have resulted in margins in the range of one percent. The margin found here, without consideration of plaintiff's data, was approximately thirty-three percent. [ ][3] It had a loss in 1986.

The court notes that because of the hardship on plaintiff and the limited legal issue on the merits, the court has set a schedule which should ensure this matter is before the court for resolution in September. Thus, the court is most concerned with the effects of cash deposits over the next few months. [ ][3] Given these factors and plaintiff's poor profit history, the requirement of cash deposits for a few months, or the injunction against such deposits, would not appear capable of causing a dramatic shift in plaintiff's business fortunes. Nonetheless, the court must consider whether requiring cash deposits would cause severe disruption to plaintiff's business.

Plaintiff's witness indicated that it is unlikely plaintiff could obtain financing to cover the duties or raise prices to generate the extra income without losing customers on a more or less permanent basis. The court concludes that plaintiff has demonstrated these results are possible; it has failed, however, to demonstrate that they are probable. Plaintiff's witness did not testify that financing was sought and denied. No financial statement demonstrating lack of reserves was presented. No request to plaintiff's solvent parent (it is a wholly owned subsidiary of its inventory supplier) for extension of its usual ninety day payment terms or other assistance was made. When questioned about which customers would tolerate a price increase and in what amounts, plaintiff's witness was vague.

Plaintiff's list price per ton is about $180. The sole domestic supplier's list price is about $70 higher. Even assuming that plaintiff is correct about some of the reasons for the difference, there appears to be some room for a price increase. In addition, although its inventory might not be located in the most convenient warehouses, as

[3] The brackets in this memorandum designate sentences which have been deleted because they contain confidential business information.

far as the court can determine plaintiff has on hand about twenty-five percent of its annual industrial sodium nitrate imports. This stock should help ease the short term problem.

Plaintiff's case was noticeably lacking in documentary evidence. No marketing studies, written financial data or other hard evidence of the serious permanent harm which would result from denial of the injunction was presented. Plaintiff has demonstrated hardship and a *potential* for serious damage; it has not demonstrated likelihood of irreparable harm. Accordingly, plaintiff's motion to post bond instead of cash deposits pending resolution of this matter is denied.

(Slip Op. 87-90)

BELFONT SALES CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 81-12-01724-S

OPINION

[On classification of quartz analogue wrist watches, judgment for the plaintiff.]

(Decided July 30, 1987)

Stephen R. Sosnov for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice *(Judith M. Barzilay* and *Paula N. Rubin)* for the defendant.

AQUILINO, *Judge:* This case challenges Customs Service classification under TSUS item 715.05 ("Watches") of merchandise referred to collectively hereinafter as a quartz analogue watch or "QAW". Duties were assessed under item 716.27 or item 716.29 according to the widths of those QAW elements considered "watch movements" and under item 720.24 or item 720.28, depending on the composition of their cases. The plaintiff claims that the merchandise was dutiable as an entirety under item 688.45 ("Electrical articles and electrical parts of articles, not specifically provided for: * * * Other").

I

In order for a timepiece to be classified as Customs did herein, it must contain a "watch movement". *Compare* TSUS Schedule 7, Part 2, Subpart E (1980) *with Texas Instruments Inc.* v. *United States,* 82 Cust.Ct. 272, C.D. 4810, 475 F.Supp. 1183 (1979), *aff'd,* 67 CCPA 59, C.A.D. 1244, 620 F.2d 269 (1980) [*"Texas Instruments I"]; Texas Instruments Inc.* v. *United States,* 82 Cust.Ct. 287, C.D. 4811, 475 F.Supp. 1193 (1979), *aff'd,* 67 CCPA 57, C.A.D. 1243, 620 F.2d 272 (1980); *and Texas Instruments Inc.* v. *United States,* 1 CIT 236,

518 F.Supp. 1342 (1981), *aff'd,* 69 CCPA 136, 673 F.2d 1375 (1982) ["*Texas Instruments III*"].

In *Texas Instruments I,* the Court of Customs and Patent Appeals agreed with the Customs Court that a watch movement "requires a mechanism for the transfer of motion." 67 CCPA at 62, 620 F.2d at 271. Since the timepieces at issue therein were found to have no parts that "transmit mechanical energy or transfer motion to or from any other part"[1], the CCPA upheld the trial court's determination that they did not contain a movement.

In its protest to the Customs Service, the plaintiff herein claimed that the QAW was improperly classified because

> the electronic module and its housing do not incorporate the transfer of physical motion, and therefore do not constitute a movement within the intendment of the Tariff schedules [*sic*] of the United States.

At trial, the plaintiff presented one expert witness and ten exhibits in support of its position that the QAW does not contain a watch movement. Exhibit 4 describes the operation of a QAW as follows:

> Oscillatory electric signals are produced exactly at 32,768Hz by an oscillator circuit consisting of a crystal oscillator and C/MOS-LSI.[[2]] The oscillator circuit includes a trimmer capacitor used to adjust the rate and a fixed capacitor for stable oscillation.
>
> In the frequency divider circuit, the 32,768Hz frequency is successively halved 15 times by a flip-flop circuit until an output pulse of 1Hz is obtained.
>
> The drive circuit delivers alternately a positive and a negative pulse at one-second intervals to the drive coil on the pulse motor.
>
> Upon receiving a pulse current on its drive coil, the pulse motor instantly makes an intermittent rotary motion along an angular distance of 60 deg. every one second.
>
> Rotation of the pulse motor is transmitted to the train wheel to drive the second, minute and hour hands, and the calendar mechanism.

Plaintiff's expert, a second-generation watchmaker and former Customs Assistant Area Director for Classification and Value, opined that the merchandise at issue does not contain a watch movement since it does not have a balance wheel, a mainspring or an escapement. While recognizing that a QAW contains a stepping motor that is "part of the movement of the various wheels which subsequently move the face of the watch"[3] and a gear train, with several pinions, which moves the hands[4], the witness claimed that these elements of a watch were never known in the trade and commerce of the United States as a watch movement. *See* Tr. at 24.

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[1] 67 CCPA at 63, 620 F.2d at 271.
[2] Signifies the electronic circuit.
[3] Trial Transcript ("Tr.") at 30.
[4] *See id.*

This testimony is diminished, however, by the contents of an affidavit given by this same expert in *Texas Instruments III*, where he declared:

> * * * It is my opinion that *the term, movement, is not limited to those articles which employ balance wheels and hairsprings to operate.* Indeed, in commercial parlance, the term movement refers to both the traditional balance wheel movement and to the electronic "module".[5]

In that case, the module at issue was incorporated in a quartz digital watch, a solid-state electronic timepiece which the court(s) found not to contain a movement. That position of this witness is hard to reconcile with his testimony in the case at bar. If one believes that the quartz digital watch entails a movement, it would seem *a fortiori* that the same person would consider the QAW, with its distinct moving parts, to have a watch movement.[6]

Defendant's witness, Henry B. Fried, a third-generation watchmaker, teacher, and an author in the field of horology, testified that the term watch movement refers to "the all-inclusive enclosure in the watch case when it contains mechanical elements". Tr. at 70. Those mechanical elements "[t]ransfer motion, visibly, physically, from the power source to the hands". *Id.* He pointed out that the QAW contains the following parts which are identical to those found in a mechanical watch:

> center pinion, center wheel, third wheel, fourth wheel, fourth wheel pinion, * * * a cannon pinion, and hour wheel, minute wheel, minute wheel pinion, index wheel, clutch wheel, clutch spring, clutch and crown and stem and a spring, clock springs, fan dial and hands. *Id.* at 69.

Some of those wheels are also found in tuning-fork watches like the Bulova Accutron. *Id.* Mr. Fried disagreed with plaintiff's expert, who had testified that that timepiece does not contain a movement. The question of whether the Accutron, which apparently has been classified by Customs under Schedule 7, contains a movement seems to be analogous to the question as to whether the QAW contains a movement.[7] Mr. Fried testified that the

> tuning fork operates * * * electrically. It is stimulated, so its tines vibrate, in its own natural frequency. The movement of the tines is wide enough, in its amplitude, so it can accept a pawl, mounted on any one of the tines, which, in close proximity to an index wheel, a tiny watch ratchet wheel with slanted teeth, * * * will nudge it, at each oscillation of the tuning fork

[5] Affidavit of Feb. 6, 1981, para. 14 (emphasis added). *See* Tr. at 33.

[6] The witness on redirect claimed that he had not been the author of the affidavit [*see* Tr. at 38] and that, at the time sworn to, he had explained to the lawyer who had drafted the language that the module could not be called a watch movement. *See id.* at 38 and 39. Furthermore, the witness pointed out that he "never called it a watch movement. I called it a movement." *Id.* at 39.

This court is not convinced of the attempted distinction between a movement and a watch movement, as the affidavit was clearly referring to a watch movement; it stated that manufacturers of the quartz digital watch refer

> to the "module" portion * * * as a "movement," not withstanding that it lacked the traditional balance wheels and hairsprings which transfer energy into motion. Affidavit of Feb. 6, 1981, para. 12.

[7] Since classification of the Accutron is not at issue here, the court expresses no opinion as to the applicability of Schedule 7 to it.

> and become the motor, which turns all the wheels, eventually, to indicate time upon its dial and hands, through the dial and hands. *Id.* at 59.

While the Accutron contains an indexing wheel, third wheel, fourth wheel, minute wheel, hour wheel, intermediate wheel and setting wheels which are similar to those found in mechanical watches[8], like the QAW, it has no balance wheel or escapement. *See id.* at 26.

The trial court in *Texas Instruments I* determined that the quartz digital watch is

> [u]nlike the conventional watch containing a balance assembly or *the electro-mechanical watch containing a tuning fork in both of which a definite mechanical motion is transferred to other component parts within the movement* * * *. 82 Cust.Ct. at 279, 475 F.Supp. at 1187.

The QAW is similar to the electro-mechanical watch in that "mechanical motion is transferred to other component parts" in each. This fact thus distinguishes the QAW from the merchandise at issue in *Texas Instruments I* and leads this court to find that the QAW does contain a watch movement. This is not to say that the QAW (or the Accutron) have many of the parts that were described in *Texas Instruments I* as the "principle components comprising a *conventional* watch movement"[9], but the quantum of such elements is not conclusive as to whether nonconventional timepieces contain watch movements. *Cf.* P. Hood, How Time Is Measured 29 (2d ed. 1969) (describing the Accutron as an "unusual watch").

The plaintiff maintains that "Congress intentionally did not wish to include watch movements with other than the traditional balance wheel and hair spring in the classification of 'watch movements' ". Plaintiff's Brief, p. 26. The legislative history does not support this position. While there was a proposal that would have segregated in the TSUS movements not regulated by a balance wheel and a hairspring from those regulated in the traditional manner, that text was deleted before the tariff schedules were adopted. Many importers opposed the proposal, which would have instituted a higher rate of duty for nonconventional movements and thereby "impose[d] an enormous handicap on the introduction of new technology in the watch industry". *Tariff Classification Study: Explanatory and Background Materials,* Sched. 7 at 730 (1960).

The plaintiff also insists that classification under Schedule 7 is improper since "quartz analog watches are electrical articles based on technology alien to the pre-1962 horological industry". Plaintiff's Brief, p. 41. While the QAW apparently was not in existence at the time the TSUS was enacted, tariff schedules do "embrace merchandise unknown at the time of their enactment". *Texas Instruments I,* 82 Cust.Ct. at 282, 475 F.Supp. at 1190. As explained by the court in

[8] *See* Tr. at 59 and 60.
[9] 82 Cust.Ct. at 281, n. 6, 475 F.Supp. at 1189, n. 6 (emphasis added).

Smillie & Co. v. *United States*, 12 Ct.Cust.App. 365, 367, T.D. 40520 (1924),

> the statute will be held to apply if the articles possess an essential resemblance to the ones named in the statute in those particulars which the statute established as the criteria of the classification.

The QAW does possess a resemblance to the traditional analogue watch with a movement. Both have mechanisms that transfer motion to other component parts. They also have a similar outward appearance and contain a number of moving parts which are the same. Finally, plaintiff's characterization of the technology of the QAW as "alien" to the 1962 horological industry is at odds with the following testimony before the Tariff Commission by an importer:

> Clearly, the watch importing industry is not static. Our designs and technology evolve continually; and at the present time it is quite apparent to those of us in the watch business that new concepts will be developed at an increasingly rapid rate in the future. Frankly, we cannot tell you whether, 5 or 10 years from now, Benrus watches will be operated or regulated by a balance wheel and hairspring or by a tuning fork or by a synchronous motor or *by quartz crystals* or by an atomic particle or a radio signal or any number of other possibilities. Let me assure you that, in Switzerland and in this country, keen minds are at work on all these possibilities. *Tariff Classification Study, supra,* at 735 (emphasis added).

In light of comments of this nature made by several importers, this court cannot accept plaintiff's position that "only traditional watch movements, with a balance wheel and hair spring, were intended to be included in the watch movement provisions". Plaintiff's Brief, p. 24. That is, the court is not persuaded that the QAW does not contain a watch movement in view of the thorough analyses in the *Texas Instruments* cases.

II

Notwithstanding the foregoing finding that the watches at issue contain movements, classification of the QAW under item 715.05, TSUS is incorrect in that the heading to items 716.27 and 716.29 requires the movements to be:

> Not adjusted, not self-winding (or if a self-winding device cannot be incorporated therein), *and not constructed or designed to operate for a period in excess of 47 hours without rewinding:*[10]

The defendant contends that the classification is appropriate, as the

> watches were designed to operate in excess of 47 hours without rewinding because *these watches were designed to operate without winding.* Logic dictates that a watch which cannot be

[10] Emphasis added. The evidence herein shows that the QAW is never wound and that battery life expectancy is one year or more.

> wound in the first place, cannot be rewound. Therefore, this merchandise was properly classified under the provision for watch movements not constructed or designed to operate for over 47 hours without rewinding. Defendant's Brief, p. 16 (emphasis in original; footnote omitted).

The tariff, however, contemplates winding, as the prefix "re" means "again"[11]. To perform an act again, it has to have been performed in the past. *See, e.g., Union Wire Rope Corp.* v. *Atchison, T. & S.F. Ry. Co.,* 66 F.2d 956, 967 (8th Cir. 1933) (" 'Reworking' * * * means working again * * *. It means that the articles have been 'worked' before they reach the transit point, and that the tariff allows them to be there worked again"); *Zehring* v. *Brown Materials,* 48 F.Supp. 740, 743 (S.D.Cal. 1943) ("The prefix 're-' means 'again,' so that 're-tail' originally meant 'tell-again.' "). The court in *Texas Instruments III,* in addition to finding no movement in the quartz digital watch, also noted the fact that the watch had not been wound. *See* 1 CIT at 244, n. 3, 518 F.Supp. at 1346, n. 3.

The defendant refers to a 1931 decision by Customs that a battery-operated watch which had no mainspring and therefore could not be wound was not subject to the one-dollar additional duty prescribed by subparagraph 367(a)(5) of the Tariff Act of 1930 for watches "constructed or designed to operate for a period in excess of 47 hours without rewinding" because that provision was "intended to cover movements which must be wound, otherwise they could not be rewound". T.D. 44779, 59 Treas.Dec. 820 (1931). Thus, the battery-operated watch, which was otherwise clearly within the purview of paragraph 367, was only subject to the other duties thereunder. In contrast to the 1930 act, Schedule 7 of the TSUS directly tied the watch-movement provisions not only to "constructed or designed to operate for a period in excess of 47 hours without rewinding" per item 719, but also to "not constructed or designed to operate for a period in excess of 47 hours without rewinding" per the heading to the items apposite herein, *supra* page 9, and apparently precluded the classification under those provisions of watches that are not rewound. As the defendant itself admits at page 16 of its brief, "a watch which cannot be wound in the first place, cannot be rewound".

Whether or not Congress was aware that it was precluding such watches from its movement provisions[12], "this court must * * * apply the statute that Congress enacted". *Internor Trade, Inc.* v. *United States,* 10 CIT ——, 651 F.Supp. 1456, 1459 (1986). As the court reiterated in *Al Tech Specialty Steel Corp.* v. *United States,* 10 CIT ——, 651 F.Supp. 1421, 1425 (1986), "[i]t is an established principle

[11] For example, Webster's New International Dictionary of the English Language (2d ed. 1945) defines "re" at page 2070 as follows:

> 2. *Again;*—used chiefly to form words, esp. verbs, of action, denoting in general *repetition* (of the action of the verb), or *restoration* (to a previous state) * * *. [emphasis in original]

[12] The court notes in passing that the U.S. Tariff Commission had been alerted to this possibility. *See Tariff Classification Study: Explanatory and Background Materials,* Sched. 7 at 825 (1960).

of jurisprudence that where a statute's meaning is clear, that meaning will be controlling".

Having carefully analyzed TSUS Schedule 7, this court concludes that it does not cover the QAW, which does not entail rewinding, and classification thereunder by Customs was therefore incorrect.

III

In their pretrial order, the parties stipulated "that if the merchandise is not classifiable under item 715.05, TSUS, then the proper classification is under item 688.45". The trial court in *Texas Instruments III* held that the quartz digital watch should be classified under this item, pointing out that it,

> [i]n the same manner as the preceding item, 688.44, specifically relates to electrical articles using digital integrated circuits to produce sound, so under the claimed classification, item 688.45. "electrical articles * * *, other," the merchandise in question consists of articles using digital integrated circuits to produce time. 1 CIT at 245, 518 F.Supp. at 1346.

The same is true for the QAW, which also employs an integrated circuit for the measurement of time.

* * * * * * *

In conclusion, the plaintiff has persuaded this court that Customs incorrectly classified the subject merchandise and that the correct classification is under item 688.45, TSUS. Judgment will enter accordingly.

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